HOW MAY THE UNITED STATES GOVERN THE PHILIPPINE ISLANDS?

IN discussions of the future government of the Philippine Islands, it seems often to be taken for granted that under our constitution a scheme of governmental organization for the islands must be provided directly by act of Congress, as was done in the case of Porto Rico; and that the plan employed by Great Britain in respect to the crown colonies could not constitutionally be adopted. As hardly needs to be pointed out, all governmental power over a crown colony is vested in the Crown in Council, which enacts all legislation which it deems necessary. Could the Congress of the United States vest in the President and such persons as he should appoint similar powers over the Philippines? In a very interesting and instructive article in the first number of the *Columbia Law Review* Mr. E. B. Whitney discusses this question, taking as his text the bill proposed at the last session of Congress by Senator Spooner of Wisconsin, but which failed to become a law.[1] This bill, which was to take effect when the insurrection should "have been completely suppressed," provided that

> all military, civil and judicial powers necessary to govern the said islands shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property and religion.

In other words, it granted to the President not only all executive but also all legislative and judicial power, so far as might be "necessary to govern" the islands.

[1] Since the above was written, the President has transmitted to the Senate a communication from the Taft Philippine Commission, urging the passage of the Spooner Bill at the present session.

Would such a grant to the President be constitutional? To this question Mr. Whitney is inclined to give an affirmative answer; but he arrives at his conclusion by a process which, it seems to the present writer, is based on a failure to appreciate the exact nature of the constitutional problem with which he is dealing. It is the aim of this article to show that, while the answer which Mr. Whitney gives to the question is undoubtedly correct, it may be reached by a much simpler and less doubtful line of reasoning.

What Mr. Whitney attempts is to show that the supposedly fundamental principle of our national governmental organization — namely, that Congress may not delegate to the President the powers of legislation vested in it by the constitution — is not practical, has never been applied by the United States Supreme Court in any case in point, has been to a great extent departed from in certain decisions of that court which he discusses, and would perhaps not be invoked by the court to nullify the grant in question. His argument is, in substance, as follows:

> Our government is divided into three branches, executive, legislative and judicial. Its theory is that each branch shall perform its own functions, and not delegate them to the other. . . .
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> But, while the United States Supreme Court has at various occasions recognized the general principle that legislative power cannot be delegated, it has never yet found it to be applicable to any case that actually came before it for decision; and while the principle as a general principle has been generally recognized in the State Courts, the actual number of statutes which have been by them declared unconstitutional is but small.

Then follows a discussion of the cases in which the United States Supreme Court has permitted Congress to delegate very wide powers of "legislative discretion" to the President and members of his cabinet, from which the following conclusion is drawn:

> It seems to me that the courts, while repeating the old maxim that legislative power may not be delegated, have very nearly overthrown it, and have done so because it was not based on sound reasoning,

and has always been impracticable in application. The maxim is, in fact, a restriction on legislative power. If Congress believes that the practical limitations on its own time and on its own means of information are such that all legislation upon one subject or upon all subjects in the Philippine Islands could be better provided by the President, through resident commissioners or otherwise, than by itself, why should not Congress have the power to make such an arrangement? . . . If I have correctly construed the Field and Dunlap cases,[1] then every statute is constitutional which evinces on its face a legislative belief that some executive or judicial officer is better fitted than Congress to prescribe the course of action necessary to effectuate some particular result which Congress desires, . . . and perhaps it is not improbable that this principle may be held broad enough even to cover an entire subject such as the internal government of the Philippines.

It will be seen that Mr. Whitney's affirmative answer is qualified by a "perhaps," which would seem to indicate that he himself feels some doubt as to how far the United States Supreme Court would permit this delegation to be carried. But, in the view taken by the present writer, the statement that "our government is divided into three branches, executive, legislative and judicial," with the accompanying corollary of the non-delegation of power from one department to the other, is, in the connection in which it is used, at the least misleading and causes Mr. Whitney to base his argument on wrong premises. In what follows I shall attempt to prove the constitutionality of such a law as that proposed by Senator Spooner, and shall base the proof upon the following propositions: (1) Since the doctrine of the separation of powers and the non-delegation of power from one branch of the government to the other has no application to the government of a territory, Congress may create within a territory any form of local governmental organization that it wishes. It could, therefore, should it see fit, vest all governmental power for local purposes in one person and his appointees. (2) It could designate as that person the President of the United States, provided the latter were willing to accept the duties of the

[1] Field *v.* Clark, 143 U.S. 649; Dunlap *v.* United States, 173 U.S. 65.

office. In discharging the powers so conferred, the President would be acting, not as President of the United States, but merely as the agent of Congress in carrying on the local government of the territory, and his powers would be neither more nor less than those of any other person whom Congress might appoint to the same office.

I.

The principle of the separation of powers, with its corollary that one department may not delegate its powers to another department, applies, so far as the Constitution of the United States is concerned, only to the three departments — executive, legislative and judicial — created by the constitution itself, when they are acting as departments of the national government, *i.e.*, when they are enacting or enforcing laws which apply generally throughout the country. The doctrine that powers may not be delegated is derived entirely by implication from those articles of the constitution which provide for the three departments of the national government and vest in each the corresponding powers. But in the case of the territories no separation of powers is made in the constitution; nowhere is any framework of governmental organization outlined; all power is vested exclusively in one body, the Congress. Whether we derive the power of Congress to govern the territory belonging to the United States from the constitutional provision which enables Congress to "make all needful rules and regulations respecting the territory or other property belonging to the United States,"[1] or by necessary implication from the fact that such territory, having been lawfully acquired under the war and treaty-making powers, is not within the jurisdiction of any state, and is within the power and jurisdiction of the United States, is for our purposes immaterial; the fact that the power exists is nowhere denied, and the limitations upon it, if any, are in either case the same. Moreover, it is settled by undisputed decisions of the United States Supreme Court, as well as by the uniform practice of the government, that this power of Congress is exclusive,

[1] Constitution, Art. iv, Sect. 3.

that it may either be exercised directly or be delegated to such local governments as Congress may see fit to set up, and that in the latter case Congress may change or abolish the local government at will. In the case of National Bank *v.* County of Yankton[1] the following language is used:

> Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. *It may do for the Territories what the people, under the Constitution of the United States, may do for the States.*

In legislating for the territories, therefore, Congress acts in two different and distinct capacities: (1) as the Congress of the United States — as a national legislative body, *e.g.*, in passing a general revenue law, applying to the whole country for the purpose of raising revenue for the expenses of the general government; (2) as a local government. In the former capacity its powers of legislation may not, at least in theory, be delegated either to the executive or judicial branches of the national government; in the latter capacity it possesses, according to the language just quoted, the same powers in general which the people of a state possess with reference to their own local state government. The analogy here drawn is, of course, not perfect, for there are without doubt limitations placed by the constitution on the action of the people of a state (for example, by the Fourteenth Amendment) which would not be binding on Congress when acting as the local government of a territory; while, on the other hand, there *may* be limitations on Congress so acting which do not apply to the states.[2] With these exceptions, which for our present purposes are immaterial, the analogy holds good. When, therefore, certain persons are vested by Congress with powers of local government within a territory,

[1] 101 U. S. 129, 133.

[2] The reference here is, of course, to the limitations contained in the first ten amendments and certain other provisions; but whether these do in fact limit Congress within a territory is not within the scope of the present discussion.

they are not to be regarded as organs of the national government, in the sense that Congress has delegated to them a portion of its power as a national legislative body. That this is the case appears more clearly when we remember that, although Congress, considered as a department of the national government, possesses no executive or judicial power, and so cannot delegate any to any other person or body, nevertheless in providing local territorial governments it grants to them not merely legislative but also executive and judicial powers. The grant of these powers must, therefore, be regarded simply as a delegation of the whole or a part of the exclusive power of local government within a territory which belongs to Congress, and which it may exercise through such agencies as it sees fit. This principle is laid down with the greatest clearness in the case of American Insurance Co. *v.* Canter,[1] where it was held, in an opinion delivered by Chief Justice Marshall, that

> a territorial court was not a "constitutional court, in which the judicial power conferred by the Constitution on the General Government can be deposited," but a legislative court, "created in virtue of the general right of sovereignty which exists in the government, or in virtue of the clause which enables Congress to make all needful rules and regulations respecting territory belonging to the United States."[2]

If, when Congress confers local judicial power on a territorial court, it is not to be regarded as depositing therein "the judicial power conferred by the constitution on the general government," neither, I submit, is it to be regarded as "delegating" a portion of the executive or legislative power "conferred by the constitution on the general government" when it vests local executive or legislative power in such person or persons as it may designate.

But, it may be asked, when Congress, instead of acting directly itself, creates certain agencies to carry on the local government of a territory, is it not bound to maintain the separation of powers and to create three distinct and coördinate departments — legislative, executive and judicial?

[1] 1 Peters, 511.

[2] Miller on the Constitution, pp. 369, 370.

It will, of course, be admitted that no such limitation is expressly contained in any constitutional provision; can it be fairly implied? We have seen that, in organizing these local governments in the territories, Congress is to be considered as possessing in general the same powers which the people of a state have in organizing their state government. Is there anything in the Constitution of the United States which would prevent the people of a state from disregarding the principle of the separation of powers by adopting, for example, a parliamentary form of government, or by providing that the judiciary of the state should hold office during the pleasure of the state legislature, or by vesting all power, legislative, executive and judicial, in one body? The only provision which could by any possibility be applicable in this connection is that which provides that "the United States shall guarantee to every state in this union a republican form of government."[1] But this means, probably, nothing more than "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies";[2] and, whatever its meaning, it cannot be invoked to limit Congress in organizing the government of a territory, since it in terms applies only to the states. Even if this were not the case, it is difficult to see how the limitation could be made effective; for in Luther *v.* Borden[3] the Supreme Court decided that the term "United States" means in this connection the Congress, and that the interpretation of the meaning of the phrase "republican form of government" must lie with that body.[4] If, then, the people of a state may adopt that form of government which seems to them most advisable (subject always to the limitation above stated), and if we are to regard Congress, when it provides a form of government for a territory, as possessing the same powers which the people of a state possess in this respect, is

[1] Constitution, Art. iv, Sect. 4.
[2] Miller on the Constitution, p. 640.
[3] 7 Howard, U. S. 1.
[4] Burgess, Political Science and Constitutional Law, II, 165.

it not clear that it may adopt any form of governmental organization which it deems best adapted to the situation in the particular territory, and, in pursuance of this power, may vest all legislative, executive and judicial power for territorial purposes in one person and his appointees?

Such a conclusion is amply sustained by the precedents established by Congress in providing forms of governmental organization for the territories from the very beginning of our history under the constitution. The famous ordinance of July 13, 1787, for the government of the territory northwest of the Ohio River, was reënacted in all essential features by the first Congress, in an act which became a law August 7, 1789.[1] As originally enacted, the ordinance provided for a governor, in whom should be vested the executive power, and three judges, any two of whom should form a court with a common law jurisdiction, all to be appointed by Congress. The legislative power was then provided for as follows:

> The governor and the judges, or a majority of them, shall adopt and publish in the district such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district, . . . which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

The ordinance further provided that, when a certain population should be reached, a legislative council and house of representatives were to be entrusted with the legislative power, subject to a veto power in the governor. The only change of importance made by the law of 1789 was in the method of appointment, commission and removal, which was assimilated to that used in the case of officers provided for by the constitution. Somewhat later Congress authorized the governor and judges to repeal and alter laws which they had once adopted — a power not granted by the ordinance in its original form.

[1] U. S. Statutes at Large, I, 50.

We have, therefore, in this case a form of territorial organization in which the principle of the separation of powers is entirely ignored, all legislative power being vested in a body composed of the executive and judicial officers of the territorial government. This form of organization was followed for many years in the acts erecting new territories, including, with one exception, all that were carved out of the old Northwest. The legislative power was vested in the governor and three judges, exactly as in the original ordinance, in the case of the following territories: Territory south of the Ohio River, by act of May 26, 1790; Indiana, act of May 7, 1800; Michigan, act of January 11, 1805; and Illinois, act of February 3, 1809.[1] By the act of March 26, 1804,[2] by which the territory acquired under the Louisiana purchase was divided into two parts and a government provided for each, the legislative power within the Territory of Orleans was vested in the governor and "thirteen of the most fit and discreet persons of the territory, to be called a legislative council, who shall be appointed annually by the President." Laws were to be enacted by the governor, by and with the advice and consent of the council. Here also legislative powers are vested in an executive officer, in violation of the theory of the separation of powers. By the same act the governor and judges of Indiana Territory were given power over the other portion, the "District of Louisiana"; but in the following year a separate organization was created for this District, with the legislative power entrusted to a governor and three judges.[3] Finally, in the case of Florida, a plan similar to that adopted for Orleans in 1804 was followed.[4] Not until 1836, when we come to the territory of Wisconsin, the last to be formed out of the old Northwest, do we find three separate departments created from the outset.[5]

Principle and precedent unite, therefore, in sustaining the first proposition which I have undertaken to support. Looked at from another point of view, it seems obvious enough. When Congress provides no form of local governmental organization

[1] U. S. Statutes at Large, I, 123; II, 58, 309, 514.
[2] *Ibid.*, II, 283. [3] *Ibid.*, II, 331. [4] *Ibid.*, III, 654. [5] *Ibid.*, V, 10.

for a territory, but acts directly, as we have seen it may, we find all power, legislative, executive and judicial, concentrated in one body — that is, no separation of powers at all. Why, then, should any be necessary when, instead of acting directly, Congress adopts the more convenient and practical plan of appointing agents to act for it?

II.

But, granting all this, one question remains to be answered: May Congress designate as this one person the President of the United States, provided, of course, he is willing to accept the office? I can discover no provision of the United States Constitution which would in any way operate to prevent such a selection. As we have seen, Congress, in this case, would not delegate the legislative power vested in it as one of the three departments of the national government by the constitution, but would merely confer upon the President, or rather upon the person holding for the time being the presidential office, the power which Congress admittedly possesses of governing the territory in question. The President, in carrying out the duties of such an office, would be acting, not as the President of the United States, but simply as the appointee and agent of Congress. In other words, one person would hold two offices — the presidency of the United States and the governorship of a territory — which, so far as I can see, are in no way incompatible. I think I am justified in saying that the only incompatibility created by the constitution is that between membership in the Congress and the holding of civil office under the United States.[1] That provision has obviously nothing to do with the case in hand.

As a matter of fact, the case for the Spooner Bill is won when it is once admitted that in governing the territories Congress need not act directly, but may delegate to agents

[1] Constitution, Art. i, Sect. 6. It may not be without interest in this connection to point out that Marshall presided as Chief Justice at the February term of the Supreme Court in 1801, though still holding the office of Secretary of State.

such powers as it sees fit, regardless of the separation of powers. The principle that Congress may not delegate to the President any part of its power as a national legislative body is only a part of a much broader proposition, *viz.*, that it may not delegate that power to any other person or body whatsoever, whether officers of the government or not. Its power of local government in a territory it may, however, delegate in whole or in part to others, and therefore to the President, unless its inability to do this be rested on some principle other than that on which the prohibition is based in the case of its powers as a national legislature. So far as I am aware, no other principle has ever been suggested. May we not, therefore, safely answer our second question also in the affirmative?

If the foregoing views be sound, we must conclude that the doctrine that Congress may not delegate its powers of legislation to the President is absolutely no bar to the adoption of the principle of the Spooner Bill, and that Congress may, if it thinks it advisable, enact such a law, with no fear that its constitutionality can be successfully impeached. The expediency of that or any similar project it is not the purpose of the present article to discuss. It may, however, be pointed out in conclusion that we need have no fear that the adoption of the plan would result in an increase in the powers of the President at the expense of the other branches of the national government; for in this case the power that grants may also take away, and Congress could at any time by the requisite majority revoke the authority which it had from motives of convenience conferred upon the person occupying for the time being the presidential chair.

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